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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: JUN 19 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a drywall hanger and finisher. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had failed to demonstrate that the beneficiary has the training and experience which the petitioner stated, on the Form ETA 750, that the proffered position requires.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the Form ETA 750 request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on February 1, 2000. The

proffered salary as stated on the labor certification is $14 per hour which equals $29,120 annually.

The petitioner is also obliged to demonstrate that the beneficiary has the education, training, and experience stated on the Form ETA 750 as prerequisites for the proffered position. The Form ETA 750 states that the proffered position requires two years of technical training, and two years of experience in blueprint reading and building.

With the petition, the petitioner submitted insufficient evidence to demonstrate that the beneficiary has the training and experience shown on the Form ETA 750 and no evidence pertinent to its ability to pay the proffered wage. Therefore, the Texas Service Center, on January 7, 2002, requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and evidence showing that the petitioner is qualified for the proffered position pursuant to the terms of the Form ETA 750. The Service Center also specifically requested a copy of the petitioner's 2000 corporate tax return, a copy of the Form W-2 or Form 1099 for each of the petitioner's employees during 2000 and 2001.

In response, the petitioner submitted a copy of its 2000 and 2001 Form 1120S U.S. income tax returns for an S corporation. The petitioner also submitted a letter from the petitioner's previous employer stating that the beneficiary worked as a drywall finisher, mason, and supervisor from February 12, 1996 to March 3, 1999. The petitioner did not provide the requested W-2 or 1099 forms.

The 2000 tax return shows that the petitioner declared a loss of $1,010 as its ordinary income from trade or business activities during that year. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 tax return shows that the petitioner declared an ordinary income from trade or business activities of $11,493 during that year. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On May 22, 2002, the Director, Texas Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director observed that the Form ETA 750 states that the proffered position requires two years of experience and two years of technical training. The director further observed that the petitioner has

demonstrated only that the beneficiary has two years of experience, but not that the beneficiary has the required technical training.

On appeal, the petitioner correctly notes that the decision of denial misstated the nature of the proffered position and the name of the petitioning entity. The petitioner further states that the position requires either two years of training or two years of experience, but not both. Finally, the petitioner observes that it paid $60,860 in wages during 2000 and $34,479 in wages during 2001, and that those amounts both exceed the proffered wage of $29,120. The petitioner argues that this demonstrates its ability to pay the proffered wage.

The misstatement of the petitioner's name and the nature of the proffered position below does not pertain to the basis of denial and was a harmless error.

The Form ETA 750 clearly states that the proffered position requires two years of technical training and two years of experience. Although those requirements may have been placed on that labor certification in error, neither the petitioner nor this office is able to amend the requirements stated on an approved labor certification in order to render a petition approvable. The petitioner has not demonstrated that the beneficiary has the requisite training shown on the labor certification. Therefore, the petition may not be approved.

Finally, that during 2000 and 2001 the petitioner paid wages in excess of the proffered wage does not indicate that it has the ability to pay the proffered wage. The petitioner must demonstrate either that it had the ability to pay the proffered wage **in addition** to the wages it actually paid, or that, had it been able to employ the beneficiary during those years, the beneficiary would have replaced one or more employees whose wages, in the aggregate, were sufficient to pay the proffered wage.

The petitioner has submitted no evidence that the beneficiary would have replaced an incumbent employee. Therefore the petitioner must show that it had sufficient income and assets to pay the proffered wage, in addition to the wages it actually paid during those years.

During 2000, as was noted above, the petitioner declared a loss, rather than income, and had negative year-end net current assets. The petitioner has not shown that it was able to pay the proffered wage during 2000.

During 2001, the petitioner declared an income of $11,493 and again had negative net current assets at the end of the year. The

petitioner's income during that year was insufficient to pay the proffered wage. The petitioner has failed to show that it was able to pay the proffered wage during 2001.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.